

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

WRIT PETITION NO. 1699 OF 2016

Vasudeo Vithal Relekar

.. Petitioner

Vs.

Vijay Appasaheb Gavali & ors.

.. Respondents

Ms.A.R.S.Baxi, for the Petitioner.

Mr.J.B.Panke a/w Mr.G.M.Savagave, for Respondent Nos.1 to 3.

Mr.A.B.Tajane, for Respondent Nos.5 to 12.

***CORAM : N.M.Jamdar, J.
TuEsday, 27 September 2016.***

P.C. :

Notice is issued on 17 February 2016 for final disposal. Notice has been served. The learned counsel appears for Respondents. Taken up for disposal.

2. The short question that arises in this Petition is whether the learned Civil Judge Barshi, by the impugned order should have deferred the application for appointment of Court Commissioner and instead frame a preliminary issue.

3. As far as Respondent Nos.5 to 12 are concerned, reply is filed on their behalf pointing out that they stand deleted by way of a compromise pursis and they need not have been joined to this

Petition. The learned counsel for the Petitioner accepts this position and seeks leave to amend title of the Petition to delete Respondent Nos.5 to 12. Leave as sought for granted. Amendment to be carried out forthwith.

4. The suit has been filed on 11 January 2012 by the Petitioner for injunction. Subsequently, an amendment was carried out on 8 August 2012 seeking to place on record that on 30 June 2012 certain portion of the *bandh* of the suit property was sought to be encroached by the Defendants by removing the boundary stones. The learned Civil Judge has taken this as an admission on the part of the Petitioner that the Petitioner was not in possession and therefore, suit for injunction was not maintainable and has *suo motu* framed a preliminary issue. Prima facie, the reasoning of the learned Civil Judge to hold that suit is not maintainable, does not appear to be correct. However, I am not inclined to conclude the issue as the same is only framed by the learned Civil Judge. But the exercise of the learned Civil Judge in framing preliminary issue *suo motu* and then holding that the application for appointment of Court Commissioner need not be considered, was not warranted. The application was filed on the ground that the Commissioner appointed has submitted a report that in the terms stated it is not possible to carry out the commission. The learned Civil Judge ought to have decided whether the application filed by the Petitioner on merits, after hearing both the parties. Instead as stated above, has not decided the application, by framing a

preliminary issue. Therefore, the intervention under Article 227 of Constitution of India is necessary to direct the learned Civil Judge to decide the application Exhibit 63 filed by the Petitioner on its own merits. As far as framing of preliminary issue is concerned, the learned Judge may consider the same after decision on the application for appointment of Court Commissioner. As far as the application for appointment of Commissioner is concerned, the contention of parties are kept open. Writ Petition is disposed of in above terms.

(N.M.Jamdar, J.)